IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

BUTLER B. HALL
Plaintiff

V. NO. 1:95CV262-B-D

THE KANSAS CITY SOUTHERN
RAILWAY COMPANY
Defendant

MEMORANDUM OPINION

This cause comes before the court upon the defendant's motion for summary judgment. The court has duly considered the parties' memoranda and exhibits and is ready to rule.

FACTS

On February 12, 1994, the plaintiff was injured as a result of an automobile/train collision at a railroad crossing on Claude Hazelwood Road, in West Point, Clay County, Mississippi. The plaintiff was the driver of the automobile and the defendant was the operator of the train. The plaintiff subsequently filed suit against the defendant alleging that the defendant was negligent in failing to erect additional warning devices at the subject crossing, failing to erect and/or maintain a crossbuck at said crossing, failing to blow the horn and ring the bell on the engine as the train approached the crossing, and in causing its locomotive to "pass rapidly over the tracks of said crossing."

The plaintiff lived near the tracks and was returning home from town when the accident occurred. According to the plaintiff's

deposition testimony, he had driven across the tracks six or seven times a day for forty years, and would see trains traveling through the railroad crossing up to three times per week. The plaintiff further testified that he was familiar with the terrain surrounding the crossing, and with the difficulty in seeing oncoming trains when approaching the crossing from the direction of town.

Between 1981 and 1983 federal funds were expended for warning signs and markings at the Claude Hazelwood Road Crossing, denominated by the Federal Railroad Administration as DOT number 305891P. The federal funds were used to install two white pavement warning markings and two advance warning signs at the railroad crossing in question prior to the accident. The expenditure of the federal funds and the installation of the warnings were approved and accepted by the Federal Highway Administration.

LAW

On a motion for summary judgment, the movant has the initial burden of showing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 325, 91 L. Ed. 2d 265, 275 (1986) ("the burden on the moving party may be discharged by 'showing'...that there is an absence of evidence to support the non-moving party's case"). Under Rule 56(e) of the Federal Rules of Civil Procedure, the burden shifts to the non-movant to "go beyond the pleadings and by...affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate

'specific facts showing that there is a genuine issue for trial.'" Celotex Corp., 477 U.S. at 324, 91 L. Ed. 2d at 274. That burden is not discharged by "mere allegations or denials." Fed. R. Civ. P. 56(e). All legitimate factual inferences must be made in favor of the non-movant. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 216 (1986). Rule 56(c) mandates the entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp., 477 U.S. at 322, 91 L. Ed. 2d at 273. Before finding that no genuine issue for trial exists, the court must first be satisfied that no reasonable trier of fact could find for the non-movant. Matsushita Elec. Indus. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 552 (1986).

The plaintiff's state law negligence claim regarding the failure to erect additional warning signals at the subject crossing is preempted by federal law. The undisputed evidence shows that the state received federal funds which were used to install two white pavement markings, two advance warning signs, and one inventory marker at the Claude Hazelwood Road crossing. The use of the federal funds was approved and accepted by the Federal Highway Administration. The Federal Rail Safety Act preempts state law claims when federal funds are used to improve the warning devices at the subject crossing. CSX Transp., Inc. v. Easterwood, 507 U.S.

658, ___, 123 L. Ed. 2d 387, 397-402 (1993); Hester v. CSX Transp., Inc., 61 F.3d 382, 385-387 (5th Cir. 1995), cert. denied, ___ U.S. ___, 133 L. Ed. 2d 760 (1996).

The plaintiff's claim that the train was traveling at an unsafe rate of speed is likewise preempted by the provisions of the Federal Rail Safety Act. It is uncontroverted that the speed limit for the section of track upon which the collision occurred was 25 miles per hour. The engineer stated in his affidavit that the train was traveling between 23 and 25 miles per hour at the time of the collision. The plaintiff has attempted to rebut the engineer's testimony by submitting an affidavit of his own in which he states the train was traveling in excess of 25 miles per hour. However, the plaintiff's evidence regarding the train's rate of speed is inadmissible. The plaintiff testified in his deposition that he did not see the train until he was within twenty feet of the tracks. The plaintiff therefore did not have an adequate opportunity to observe the train and determine its approximate rate of speed. See Carpino v. Kuehnle, 54 F.R.D. 28, 30 (W.D. Pa. 1971), aff'd, 474 F.2d 1339 (3rd Cir. 1973). The plaintiff further testified in his deposition that the train must have been going fast by how far the train went before it stopped. However, the plaintiff has likewise failed to lay the proper predicate for determining speed by stopping distance. The plaintiff does not assert that he has any experience in driving trains, nor does he

submit mathematical testimony regarding how long it should take a train of this size and weight to stop if it were only traveling 25 miles per hour. Since the plaintiff's affidavit and deposition testimony fail to lay the proper predicate for determining the speed of the train, the plaintiff's evidence regarding speed is insufficient to rebut the engineer's testimony. If it is undisputed that the train was traveling within the applicable speed limit, than any state law claims for negligently operating the train at an unsafe speed are preempted by federal law. Easterwood, 507 U.S. at ___, 123 L. Ed. 2d at 402-404; Wright v. Illinois Cent. R.R. Co., 868 F. Supp. 183, 186-187 (S.D. Miss. 1994).

The plaintiff's claim that the defendant was negligent in failing to erect and/or maintain a crossbuck at the subject crossing is deficient for lack of proximate cause. A crossbuck is a passive warning device, which is used to identify the location of the tracks, not the presence of an oncoming train. 23 C.F.R. § 646.204(i) (1995). Since the plaintiff was well aware of the presence of the tracks, he cannot claim that the lack of a crossbuck proximately caused his injury.

The plaintiff's final claim, that the engineer was negligent in failing to blow the horn or ring the bell as the train approached the crossing, lacks sufficient supporting evidence with which to withstand the defendant's motion for summary judgment. The engineer has submitted an affidavit in which he stated

unequivocally that he began to ring the bell and sound the horn approximately 1500 feet from the crossing. In response, the plaintiff has submitted deposition and affidavit testimony in which he states that he did not hear the train's whistle or bell until just before the impact. He further testified that if the horn had blown, he would have heard it because he had his window down. The plaintiff admits, however, that he "wasn't listening for (the horn) to blow" and "wasn't looking for (the train)." The law is well-established in Mississippi that the mere fact that witnesses say they did not hear the train's bell, without proof that they listened for the bell, cannot prevail against positive testimony that the bell did ring at the time in question. Illinois Cent. Gulf R.R. Co. v. Yates, 334 So. 2d 364, 368 (Miss. 1976) (citing Mobile & O. R. Co. v. Johnson, 126 So. 827, 828 (Miss. 1930). Testimony that a witness believes he would have heard the bell if it was ringing is likewise insufficient. Id. Since the plaintiff admits that he wasn't listening for the horn to blow, and since he has no other testimony to rebut the affidavit of the engineer, the plaintiff's claim for negligence in failing to sound the horn or ring the bell cannot survive summary judgment.

CONCLUSION

For the foregoing reasons, the court finds that the defendant's motion for summary judgment should be granted.

An order will issue accordingly.

THIS, the _____ day of August, 1996.

NEAL B. BIGGERS, JR.
UNITED STATES DISTRICT JUDGE